SEISIN AND DISSEISIN

THE exaltation of possession in the common law which began with Mr. Justice Holmes [1] reached its culmination in the Disseisin of Chattels [2] of the late Dean Ames. He would have made possession an essential of ownership, so that to lose possession was to lose ownership,[3] with nothing left in a dispossessed owner but a chose in action.[4] That this glorification of possession has not yet entirely spent its force is evident from the increased prominence given to possession in late case-books on personal property. It may therefore be well to consider whether seisin and disseisin did mean to the common law what they meant to Ames, and if this be so or not whether for most purposes they have not long been obsolete.

I

SEISIN

Seisin and disseisin suggested quite different things to our mediæval lawyers. The one suggested peace and quiet,[5] the other robbery, burglary, piracy, and the like.[6] One could be seised of a chattel.[7] It was never common usage to speak of the disseisin of anything but a freehold.[8] Seisin was fundamental. "It was so important that we may almost say that the whole system of our land law was law about seisin and its consequences." [9] Disseisin owed its importance to the assize of novel disseisin, which was statutory in origin [10] and based on a foreign model.[11] So favored, however, was the assize by courts and legislature alike that dis-

[1] COMMON LAW, 164–246.

[2] 3 HARV. L. REV. 23, 313, 337; 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 541.

[3] 3 SELECT ESSAYS, 562.

[4] *Id.*, 562, 587.

[5] 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 30.

[6] Co. LIT. 18b, 3b.

[7] Maitland, 1 L. QUART. REV. 324.

[8] Ames, 3 SELECT ESSAYS, 541.

[9] 2 POLLOCK AND MAITLAND, 29.

[10] 1 *Id.*, 45.

[11] 2 *Id.*, 47.

seisin became an integral part of the land law, an important subhead of the all-embracing seisin.

Seisin meant possession.[12] Livery of seisin, therefore, meant delivery of possession. It was the operative fact of the feoffment [13] and the feoffment dominated the transfer of land.[14] Long before the Norman Conquest we are told that on the Continent they had gotten beyond the stage where an actual delivery of land was necessary to its transfer and that the delivery of a written charter or a surrender in court was enough,[15] but in England constructive livery of seisin never went very far. Livery within the view followed by entrance on the part of the feoffee during the life of the feoffor seems to have been the farthest it ever went.[16] As the livery was the operative fact of the feoffment and not the charter, which was merely evidentiary,[17] the feoffment was effective instantly or not at all. Livery was a present, physical fact, and unlike agreement or intention could not reach into the future. As a consequence we have the common-law doctrine of estates. Such only as could be conceived of in terms of the present were possible.[18]

But if seisin meant possession, it meant much more than what we ordinarily think of as possession, the power to control a physical thing. It was closely connected with the idea of enjoyment, and might be predicated of things that one could enjoy but could not touch or grasp, such as services and advowsons and freedom from toll.[19] The number and importance of these intangible things to which seisin was attributed in the Middle Ages was great.[20] Already in Bracton's time one might also be seised of a reversion, though not yet of a remainder, for the reversioner was a kind of lord who was entitled to services, whereas the remainderman was not.[21] Logically these incorporeal and future interests of which

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[12] 2 POLLOCK AND MAITLAND, 29.

[13] 2 *Id.*, 84.

[14] The grant was in place or stead of a feoffment. See CO. LIT. 49a and Butler's note (1) to CO. LIT. 271b. The fine was sometimes said to be a feoffment of record. CO. LIT. 50a; 2 BL. COM. 348.

[15] 2 POLLOCK AND MAITLAND, 86.

[16] *Id.*, 83. Entry in law was sufficient where there was fear of death or bodily harm. A claim would serve to vest a new estate in the feoffee as in the common case to revest an estate in a disseisee. CO. LIT. 48b.

[17] 2 POLLOCK AND MAITLAND, 83, 84; LEAKE, PROPERTY IN LAND, 2 ed., 32.

[18] LEAKE, PROPERTY IN LAND, 33; CHALLIS, REAL PROPERTY, 3 ed., 107.

[19] 2 POLLOCK AND MAITLAND, 34.

[20] 2 *Id.*, 124 *et seq.*

[21] 2 *Id.*, 39.

one might have seisin would have been transferable by livery of seisin and there is some evidence to show that this was the case,[22] but, as we have seen, constructive livery did not get far in the English law and it became settled that these interests lay in grant and *not* in livery.[23] The grant alone, however, was not sufficient to effect a change of seisin and thus to complete the transfer. Just as in the case of livery within the view [24] or of exchange[25] entry by the transferee was necessary during the life of the transferor, so in the case of the grant, it was necessary to complete the transfer that the tenant attorn to the grantee during the life of the grantor.[26]

Seisin played as important a part in the acquisition of property on the death of the former owner as in conveyances *inter vivos*. Except in special cases such as that of the remainder,[27] descent was traced from the person last seised.[28] *Seisina facit stipitem* was the rule.[29] In proceedings by writ of escheat it was alleged that the tenant died seised,[30] and the same thing was probably true in the case of the other feudal casualties.[31] Except by special custom, wills of land were not allowed,[32] but where they were, dying seised seems to have been essential.[33] Dower [34] and curtesy [35] depended upon seisin during coverture.

Every title had its origin in a seisin. In a proprietary action every demandant had to allege that he or some ancestor of his had been seised, "and not merely seised but seised with an exploited seisin, seised with a taking of esplees." [36] He could not count on a seisin prior to a certain date, but this date became fixed [37] and as it receded into the past became of less and less consequence. Statutes of limitations played little part in the acquisition of title in

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[22] As to the feoffment and livery of rents, commons, and advowsons, see Pike, 5 L. QUART. REV. 29–43.

[23] Co. LIT. 9a, 49a, 172a.

[24] *Supra*, n. 16.

[25] Co. LIT. 50b, 51b.

[26] LIT., § 551.

[27] CHALLIS, REAL PROPERTY, 238.

[28] Co. LIT. 11b.

[29] 2 BL. COM. 209; FLETA, lib. 6, cap. 2, § 2.

[30] Maitland states that the writ of escheat distinctly says that the tenant died seised (3 SELECT ESSAYS, 599), but this does not appear in the printed Register (REG. BREV., 164), to which he refers. See, however, FITZHERBERT, NOV. BREV., f. 144.

[31] Maitland, 3 SELECT ESSAYS, 599.

[32] 2 POLLOCK AND MAITLAND, 328.

[33] Maitland, 3 SELECT ESSAYS, 596.

[34] LIT., § 36.

[35] LIT., § 35.

[36] 2 POLLOCK AND MAITLAND, 80.

[37] *Id.*, 81.

the Middle Ages.[38] The fine was a speedy, if expensive, method of cutting off adverse claims,[39] but this was done away with by the Statute of Non-Claim of Edward III [40] and not restored until the reign of Richard III.[41]

It was in the law of actions that seisin lost its application to anything other than the freehold and became a special kind of possession. As early as the 1100's the courts denied the ejected tenant for years the assize of novel disseisin on the ground that he was not seised of a freehold,[42] and though for a time it was not incorrect to speak of him as seised of the term,[43] it became so in the latter half of the 1400's when, apparently, the growing importance of his remedy, the action of ejectment, resulted in the bestowal on him of a word of his own.[44] Henceforth he was possessed and not seised. Seisin and seisin of freeholders thus became identical and 'seisin of chattels', an anachronism.

Like the assize, the writs of entry and the writs of right were actions to recover the freehold. Upon judgment for the demandant a writ of *Habere facias seisinam* issued commanding the sheriff that he cause the demandant to have seisin of the tenements recovered.[45] Every demandant had to recover on the strength of his own seisin or that of an ancestor. There were a multitude of writs, each adapted to its particular case, and the title of the demandant and the wrong complained of had to be set forth on the record with great precision.[46] Thus the whole system of seisin outlined above became stereotyped in the forms of action.

Usurpation of the freehold might take the form of an unlawful entry or of an unlawful detainer. The latter constituted a deforcement, although in certain special cases, more properly a discontinuance.[47] Where the entry was unlawful, the usurpation of the

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[38] As to the "novel disseisin" and the "mort d'ancestor," see 2 POLLOCK AND MAITLAND, 51.

[39] 2 POLLOCK AND MAITLAND, 101.

[40] 34 ED. III, c. 16.

[41] 1 RIC. III, c. 7.

[42] 1 POLLOCK AND MAITLAND, 357; 2 *Id.*, 36, 110.

[43] 2 *Id.* 36, 110, n. 2.

[44] Maitland, 1 L. QUART. REV. 324, 337, 339.

[45] STEARNS, REAL ACTIONS, 245.

[46] Sedgwick and Wait, 3 SELECT ESSAYS, 611, 612, 616.

[47] Co. LIT. 331b. In its widest sense deforcement included an abatement, an intrusion, a disseisin or a discontinuance, as any other species of wrong, whereby he who had a right to the freehold was kept out of possession. Butler's note (1) to Co. LIT. 331b.

freehold might be a disseisin, an abatement, or an intrusion. The typical disseisin was the entry on the freehold of another and the expulsion of the freeholder.[48] Abatement was the entry of a stranger before the heir or devisee,[49] and intrusion, such entry before the remainderman or reversioner.[50]

The primitive seisin was not feudal. If it had been it could have had no application to chattels.[51] Nor was seisin of freehold feudal in the sense of being a distinctly feudal notion,[52] for the denial of a freehold to the tenant for years was probably due not to feudalism but to the Roman law.[53] On the other hand, in so far as feudalism was mere property law as distinct from public law, England was of all countries "the most perfectly feudalized." [54] Every acre of land except the royal demesne was held directly or indirectly of the king.[55] And in this feudalized land law, as we have seen, seisin played a most conspicuous part. The complicated structure of the land law was possible only because the ascending series of rights of the feudal hierarchy could be realized in a seisin.[56] Without seisin there would have been no law of estates or it would have been very different.[57] The feudal incidents,[58] the actions for their enforcement,[59] the power to distrain, all depended on seisin.[60]

But this very importance which seisin had attained in the feudalized land law was its weakness. The feudal incidents, like the inhibition against the devise, were difficult of direct attack. It took the French Revolution to get rid of them on the Continent. Destroy seisin, however, and the feudal incidents also would fall, for they were dependent on it.

II

The Rout of Seisin

Already when Littleton wrote, seisin had seen its best days. For some time it had been a common practice to make feoffments to the use of one's will or to the use of another. So common was

[48] Lit., § 279.
[49] Co. Lit. 277a; Stearns, Real Actions, 49.
[50] Co. Lit. 277a; Challis, Real Property, 3 ed., 235.
[51] Maitland, 1 L. Quart. Rev. 324.
[52] *Id.;* Hogg, 25 L. Quart. Rev. 178.
[53] 2 Pollock and Maitland, 113. But see Ames, 3 Select Essays, 541, 561.
[54] 1 Pollock and Maitland, 235.
[55] 1 *Id.*, 232.
[56] 2 *Id.*, 182.
[57] 2 *Id.*, 78.
[58] *Supra*, nn. 30, 31.
[59] *Supra*, p. 594.
[60] 2 Pollock and Maitland, 578.

the practice that when no use was stated and there was no consideration, the feoffment was presumed to be to the use of the feoffor.[61] Littleton made a feoffment to the uses of his will,[62] and Blackstone states that during the War of the Roses uses had grown to be almost universal.[63] The use was enforced in Chancery and must have been looked on commonly as the beneficial as distinct from the legal ownership.[64] In matters of descent equity followed the law,[65] but in general it did not apply the principles of seisin to the use,[66] for as regards their transfer and limitation, seisin and the use were fundamentally opposed. Technically, the use was a personal right against the feoffee to uses or his successors.[67] More fundamentally it was something that charged his conscience.[68] The mental element was all important. The Chancellor thought he could read the mind of man,[69] the common-law courts thought that this was impossible to the devil himself.[70] The medieval land law, therefore, was a rough and ready system based on obvious facts. The use was oversubtle perhaps, but it allowed the intention of the parties to operate in the transfer and limitation of rights irrespective of a change of possession. No livery of seisin was necessary to transfer the use. It could be devised. It was not subject to the feudal incidents.[71] It could be limited in many ways not possible with estates.[72]

The Statute of Uses [1536] [73] was a desperate attempt to restore the feudal revenues of the king.[74] It was hoped to accomplish this by restoring seisin to something like its former importance through

[61] MAITLAND, EQUITY, 33.

[62] Wambaugh's Introduction to LITTLETON'S TENURES, xlv.

[63] 2 BL. COM. 329.

[64] Holdsworth, 26 HARV. L. REV. 108, 115. See items 32 and 35 of the list of grievances suffered by the realm from uses, which was before Parliament in 1535–36. *Id.*, 125.

[65] SANDERS, USES AND TRUSTS, 62; LEAKE, PROPERTY IN LAND, 80.

[66] SANDERS, 65, 67; LEAKE, 80. After the Statute of Uses there was much more in common between the statutory seisin and the trust than there had been between the old common-law seisin and the use. See Burgess *v.* Wheate, 1 W. Bl. 123 (1759); S. C. 1 Eden, 177 (1758).

[67] MAITLAND, EQUITY, 29.

[68] CO. LIT. 272b.

[69] Y. B. 37 HEN. VI, 14B–3, cited by 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 506, n. 1.

[70] Y. B. 17 ED. IV, 2A–2.

[71] LEAKE, PROPERTY IN LAND, 80.

[72] *Id.*, 88.

[73] 27 HEN. VIII, c. 10.

[74] Holdsworth, 26 HARV. L. REV. 108.

the transfer of the seisin to the use.[75] New courts were created to ensure the realization of the feudal profits.[76] The devise of land by means of the use became impossible because of its transformation into the legal estate.[77]

Thus the universality of concurrent legal and equitable interests in land was destroyed. But it was the use that had conquered seisin, not seisin the use.[78] The methods of creating and transferring the use, with the exception of the will, were now recognized as legal conveyances,[79] and four years after the Statute of Uses the all-powerful Henry VIII was compelled to extend this recognition to the will also.[80] The new statutory seisin into which the use was instantly converted was "after such quality, manner, form and condition" as the executed use.[81] It would be going too far to say that the Statute of Uses had robbed seisin even of its own name and conferred it on the use, for many of the peculiarities of the old legal estates were now applied to the converted use. Thus where a converted use met the requirements of the common-law remainder, it was treated as such and as subject to its casualties.[82] It was even treated as such when it met those requirements only in part and as a remainder was void.[83] But the fantastic efforts to find a remnant of the old seisin (*scintilla juris*) to feed the use [84] were desperate attempts to avoid recognition of the fact that what the statute had done in large part was to put the stamp of seisin on the old use.

Bargain, sale, covenant, contract, agreement, and the like, were mentioned in the Statute of Uses as means of raising uses.[85] By operation of the statute they became legal conveyances.[86] The

[75] Holdsworth, 26 HARV. L. REV. 117.

[76] The principal of these courts was the Court of Wards and Liveries set up by 32 HEN. VIII, c. 46, and 33 HEN. VIII, c. 22. For the others see 4 REEVES' HISTORY OF ENGLISH LAW (ed. Finlason), 384–391. See also JENKS, SHORT HISTORY OF ENGLISH LAW, 237.

[77] That this result was intended, see 27 HEN. VIII, c. 10, § XI.

[78] See CHALLIS, REAL PROPERTY, 386, and POLLOCK AND WRIGHT, POSSESSION, 55.

[79] LEAKE, PROPERTY IN LAND, 82.

[80] 32 HEN. VIII, c. 1.

[81] 27 HEN. VIII, c. 10, § I.

[82] LEAKE, PROPERTY IN LAND, 87.

[83] *Id.* But see GRAY'S RULE AGAINST PERPETUITIES, 3 ed., §§ 58–60.

[84] Chudleigh's Case, 1 Coke, 120a; LEAKE, PROPERTY IN LAND, 90.

[85] 27 HEN. VIII, c. 10, § 1.

[86] Sugden's Note to GILB. USES, 139; KIRCHWEY'S READINGS, 161.

most conspicuous of these new legal conveyances was the bargain and sale, and if it were of a freehold, the Statute of Enrollment [1536] required that it should be enrolled.[87] This requirement may have saved the feoffment for a time [88] and undoubtedly stimulated the use of the covenant to stand seised which did not have to be enrolled.[89] In the time of James I the validity of a transfer of land by lease and release without entry and without enrollment was recognized by the courts,[90] and from that time for over two hundred years "the lease and release may be considered as having, for all purposes of general practice, superseded every other assurance, and as having been applied, with equal reason, and with equal security, in conveying lands held for an estate in possession, and lands held for an estate in reversion or remainder." [91] While the feoffment was capable of a tortious operation, the new conveyances were not,[92] and so the feoffment continued to be resorted to for its peculiar effects after it had ceased to be in common use.[93] The grant and attornment had no such efficacy,[94] and even before the lease and release had for most purposes supplanted the other assurances, attornment had greatly declined.[95]

The Statute of Uses and the measures taken to supplement it succeeded for a time in their immediate object, the revival of the king's feudal revenue.[96] But the feudal incidents were as unpopular as ever, and after an unsuccessful attempt on the accession of James I, those which constituted a real burden were gotten rid of by an Ordinance of the Long Parliament in 1646.[97]

One of the complaints in the list of grievances on which the Pre-

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[87] 27 HEN. VIII, c. 16.

[88] Another reason why the bargain and sale did not itself supplant the feoffment was that it was unsuitable for family settlements. See CHALLIS, REAL PROPERTY, 421.

[89] That the reason why the covenant to stand seised was not referred to in the statute was that it had not yet come to operate as a conveyance, see Holdsworth, 26 HARV. L. REV. 120, n. 67.

[90] Lutwich *v.* Mitton, Cro. Jac. 604 (1620); Barker *v.* Keete, Freem. 249 (1678), S. C., 2 Mod. 249.

[91] 2 PRESTON, CONVEYANCING, 3 ed., 232. See also POLLOCK AND WRIGHT, POSSESSION, 55.

[92] See Butler's note (1) VII to CO. LIT. 330a and Sugden's note to GILB. USES, 232, KIRCHWEY, 507.

[93] Stewart's note to 2 BL. COM. 316. [94] LEAKE, PROPERTY IN LAND, 41.

[95] CO. LIT. 309b. See also Butler's note (1) to CO. LIT. 309a.

[96] See JENKS, SHORT HISTORY OF ENGLISH LAW, 238.

[97] *Id.* Military tenures were formally abolished by 12 CAR. II (1660), c. 24.

amble of the Statute of Uses was based was that it was hard for one who was entitled to a real action to tell against whom to bring it.[98] The confusion in titles wrought by the practice of uses would probably go far to clear up the mystery [99] of the disappearance of the real actions and assizes. They were the detailed embodiment of the old system and were unsuited to the new. First, apparently, the statutory action for forcible entry and detainer threatened to supplant them.[100] Then they were in fact supplanted by the action of ejectment. In the time of Elizabeth ejectment had become the common method of trying title to land.[101] Reeves hazards that this revolution "at once consigned to oblivion at least one-third of the ancient learning of the law." [102]

It was perhaps poetic justice that ejectment, the action of the humble termor, should take the place not only of the assize of novel disseisin which he had been denied,[103] but of the rest of the 'hierarchy' of real actions as well, and that his 'possession' should be the means of freeing the law of actions from many of the 'sophistications' which had come to be inseparable from seisin.[104] The supersession of seisin by possession, in the law of actions, was even more thoroughgoing than the supersession of seisin by the use, in the law of property. The former had the advantage of a change in terminology, while the latter was obscured by the use of 'seisin' to indicate the old seisin and the new statutory seisin as well.[105]

Instead of the multitude of forms and pleadings in real actions which varied according to the source and quality of the demandant's title or the nature of the alleged disseisin, deforcement or other injury, "in ejectment the form of the action was always the same, without regard to the source or nature of the lessor's title, or the character of the disseisin, deforcement, or ouster." [106] In ejectment, as in the old actions, it was necessary for the plaintiff

[98] 26 HARV. L. REV. 124, § 5, 125, § 35. See also the Preamble to the Statute of Uses, § 7.

[99] Maitland, 4 L. QUART. REV. 286, 295; ADAMS, EJECTMENT, 4 Am. ed. by Waterman, 9; Sedgwick and Wait, 3 SELECT ESSAYS, 611, 615.

[100] See Finlason's notes to 4 REEVES, 235, 238, 242. See also Sedgwick and Wait, 3 SELECT ESSAYS, 611, 613.

[101] Sedgwick and Wait, 3 SELECT ESSAYS, 611, 623; MAITLAND, EQUITY, 353.

[102] 4 REEVES, 241.

[103] See *supra*, p. 595.

[104] See editorial note by Sir Frederick Pollock, 12 L. QUART. REV. 239.

[105] See POLLOCK AND WRIGHT, POSSESSION, 55.

[106] Sedgwick and Wait, 3 SELECT ESSAYS, 611, 616.

to prove his title, but in ejectment, unlike the old actions, this title appeared in neither the record nor the judgment.[107]

"Disseisin or ouster ceased to be a principal fact. Possession remained and remains material as evidence of right to possess; and in order to show that one man possessed at a given time it might and may be necessary to show that another man ceased to possess, and to fix the point of time at which his possession ceased. But this belongs, so to speak, to the accidents of fact and evidence that vary from case to case. The chief importance of such proof nowadays, if not the only importance, is in cases where long-continued possession is relied on as conferring a title under the Statute of Limitation." [108]

Entry likewise ceased to be a principal fact. Only in one case where the plaintiff had a right of entry was an actual entry necessary to maintain ejectment. That was where he wished to avoid a fine levied with proclamations.[109] The action of trespass for a disseisin which was based on a re-entry and the revesting of the freehold by relation back[110] gave place to the action for mesne profits which was supplementary to ejectment and required no such re-entry.[111]

The revolution that had been brought about in the land law is well summed up by Rawle:

"The introduction into general use of the 'covenants for title' towards the close of the seventeenth century, in place of the feudal warranty, was one of the natural incidents of the change from the ancient to the modern system of law, which, having its rise about the end of the reign of Henry the Seventh, had, towards the latter part of that of Charles the Second, assumed something of a regular form. It is familiar that the principal features of this change, effected partly by statute and partly by gradual alteration of the common law, were the restoration of the right of devise, the abolition of military tenures, the disuse of real actions, the introduction of conveyances to uses, of the mode of trying title to land by ejectment, of the statute of frauds and perjuries, and the establishment of a regular system of equitable jurisdiction. With the disuse of real actions fell the law of warranty, which, from peculiar causes, had grown to be one of the most difficult subjects in the ancient system." [112]

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[107] Sedgwick and Wait, 3 SELECT ESSAYS, 629.

[108] POLLOCK AND WRIGHT, POSSESSION, 85.

[109] 1 WMS. SAUNDERS, 319 n., and STEARNS, REAL ACTIONS, 72.

[110] AMES, LECTURES ON LEGAL HISTORY, 229.

[111] MAITLAND, EQUITY, 371.

[112] COVENANTS FOR TITLE, 5 ed., 1. Rawle's statement is adapted from Butler's Preface to the Thirteenth Edition of Co. LIT. xxii.

III

Some Survivals

Every rout, however complete, has some survivors. The rout of seisin was no exception. Mention has already been made of the *scintilla juris*,[113] of the requirement of a freehold to support a contingent remainder,[114] of the continued importance of seisin in proving title.[115] Seisin was still a stock of descent,[116] rights of entry could not be devised [117] nor alienated among the living,[118] seisin was still necessary to dower [119] and curtesy.[120] In rare cases the real actions were still used.[121] And in the clearing up of titles seisin even remained conspicuous. A fine with proclamations levied under 4 Henry VII, c. 24, and 32 Henry VIII, c. 36, was the great method for cutting off adverse claims and to accomplish this the fine had to have a freehold to support it.[122] The common recovery was the approved method of docking an entail.[123] Its efficacy depended on there being a good tenant to the *praecipe*.[124] The feoffment was still potent in establishing the seisin necessary to the validity of both the fine and the recovery.[125]

Judicial action could do something to eliminate these survivals and it is a tribute to the English Judges that they did so much.[126] Legislative action was necessary, however, to make the elimination thoroughgoing. The Reform Parliaments of the 1800's proved equal to the task. Already statutes of 4 & 5 Anne had dispensed with the attornment as necessary to complete a grant [127] and had made an entry or claim of no effect in avoiding a fine or stopping the running of the statute of limitations unless an action was commenced within a year and prosecuted with effect.[128] The Real Property Limitation Act [1833] provided that nominal entries

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[113] *Supra*, p. 598.
[114] *Supra*, p. 598.
[115] *Supra*, p. 600.
[116] Maitland, 3 Select Essays, 591, 596.
[117] *Id.*, 595.
[118] *Id.*, 594.
[119] *Id.*, 597.
[120] *Id.*, 598.
[121] Maitland, Equity, 354.
[122] Challis, Real Property, 393; 2 Preston, Abstracts of Title, 333.
[123] 1 Preston, Conveyancing, 13.
[124] Leake, Property in Land, 27.
[125] Challis, Real Property, 310, 394.
[126] See Sweet, 12 L. Quart. Rev. 239, 243. How the extension of the tenancy at sufferance and disseisin at election contributed to this end, see the following section.
[127] c. 16, § 9.
[128] *Id.*, § 16.

should be of no avail in extending the period of limitation,[129] that no rights should be preserved by continual or other claim,[130] and that with three exceptions the old real and mixed actions should be abolished.[131] The Fines and Recoveries Act [1833] abolished fines and recoveries.[132] The Dower Act [1833] allowed the widow dower irrespective of her husband's seisin.[133] The Inheritance Act [1833] substituted the purchaser for the person last seised as the one from whom the descent should be traced.[134] The Wills Act [1837] allowed the devise of a right of entry [135] and the Real Property Act [1845] its disposal by deed.[136] The latter act also provided that contingent remainders should be capable of taking effect notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold.[137] The attempt to make contingent remainders take effect as executory devises in 1844 [138] proved abortive [139] but was successful in 1877.[140] The phantom of a *scintilla juris* was laid to rest in 1860.[141]

These statutes, says the late Charles Sweet, "deprived seisin of its theoretical as well as its practical importance in all cases except two, viz. (1) where land is conveyed by a feoffment which cannot operate as any other mode of assurance; and (2) where a man claims an estate by the curtesy. . . . If the legislature had been consistent, and had abolished feoffments and made the law of curtesy similar to that of dower, seisin would be completely obsolete." [142]

Seisin, as a special kind of possession, thus ceased to be of any

[129] 3 & 4 WM. IV, c. 27, § 10.
[130] *Id.*, § 11.
[131] § 36.
[132] 3 & 4 WM. IV, c. 74, § 2.
[133] 3 & 4 WM. IV, c. 105, § 3.
[134] 3 & 4 WM. IV, c. 106, § 2.
[135] 7 WM. IV & 1 VICT., c. 26, § 3.
[136] 8 & 9 VICT., c. 106, § 6.
[137] *Id.*, § 8.
[138] 7 & 8 VICT., c. 76, § 8.
[139] 8 & 9 VICT., c. 106, § 1.
[140] 40 & 41 VICT., c. 33.
[141] 23 & 24 VICT., c. 38, § 7.

[142] 12 L. QUART. REV. 239, 244, 251. This statement has gone unanswered, as far as the writer knows, for twenty-seven years. Challis wrote to his future editor that he had thoughts of "coming out with bell, book and candle against the heretic" but he never did (CHALLIS, REAL PROPERTY, 3 ed., 436). Sweet's article had been inspired by the remark concerning seisin of Sir Frederick Pollock that "it is possible even for learned persons to treat it as obsolete. Nevertheless it is there still." But the latter explains that what he meant by seisin was "possession recognized by law" (12 L. QUART. REV. 239, n. 2). He agrees with Sweet that the tendency is away from the sophistications of seisin. The trouble with the retention of the term seisin is that it seems inseparably bound up with these sophistications. It meant possession once, but there is little of possession in it at the present time.

but historical significance save in a few exceptional cases. The Statute of Uses had reversed the priority of seisin and right. In transfers, at any rate, henceforth seisin followed right and not right seisin. Seisin became in large part an incident of title provided that the one entitled had something more than a right of entry. It indicated henceforth the having of an estate or interest rather than possession [143] and was applied extensively to equitable as well as to legal interests.[144] In representations as to title it came to be used indifferently with 'lawful seisin' to indicate not possession nor defeasible title but indefeasible title, or in other words ownership.[145] It was this identification of it with ownership that made the doctrine of tortious feoffment so obnoxious.[146] And with the feudalization of the law by Spelman and Wright and Blackstone [147] seisin in demesne as of fee became a kind of feudal ownership [148] and had to share the opprobrium of feudalism. There is little wonder that seisin became anathema and with it the doctrine of an estate turned to a right.

IV

Disseisin

It is a curious thing that the owner of land held adversely by another came in England to be considered as having a right of entry. The law of the time of Bracton knew nothing of a technical right of entry [149] but it did know a right of property and a right of possession, and when the complete right of possession, that is, seisin in demesne as of fee as evidenced by the taking of esplees, was

[143] See the third edition of Goodeve, Real Property by Elphinstone and Clark, 365, cited by Sweet, 12 L. Quart. Rev. 247, n. 4.

[144] Casborne *v.* Scarfe, 1 Atk. 603 (1737), by Lord Hardwicke; Burgess *v.* Wheate, 1 Wm. Black. 123, 161 (1759), by Lord Mansfield; Shrapnel *v.* Vernon, 2 Bro. C. C. 268 (1787), by Lord Thurlow; Lightwood, Possession, 27, 55, 172, 174; Sweet, 12 L. Quart. Rev. 247.

[145] Sweet, 12 L. Quart. Rev. 239, 247; Rawle, 55.

[146] *Infra*, IV, Disseisin.

[147] Maitland, Constitutional History of England, 142; Hogg, 25 L. Quart. Rev. 178.

[148] Seisin was said to be feudal possession (see Sweet, 12 L. Quart. Rev. 239), and to be seised in demesne as of fee, according to Blackstone, was to have the strongest and highest estate any subject could have, "the mere allodial *property* of the soil always remaining in the lord." 2 Bl. Com. 105.

[149] Lightwood, Possession, 43, 44. *Infra*, p. 606.

united to the right of property, there was that double right or *droit droit* which was the foundation of the writ of right.[150] Seisin and right of property were the two primary elements that went to make up the perfect title, and the conjunction of these two[151] in their various degrees[152] is constantly emphasized in the authorities.[153] These might be separated in many ways, as by death,[154] disseisin,[155] a tortious feoffment,[156] and until they were reunited the legal powers of the one who had the right of property but not the seisin were very limited.[157] Yet the right of property was something more than a right to recover the property by entry or action, for it did not cease with the recovery. It might and normally would coexist with the seisin.

When the right of property and seisin were separated the phrase ran, in later years at any rate, that the estate was turned to a right. Coke's illustration of this was the familiar one taken from the writs and pleadings that it was the right that descended and not the land.[158] Happily we have Bracton's commentary on this, for he makes it clear that the right into which an estate was turned at common law was right of property, and that in the beginning this was not confined to the case where the severance of the right from the seisin was tortious. Bracton says:

"There are diverse rights, one, to wit, of possession and another of property; of possession as regards the free tenement and as regards the fee.... There is likewise a right of property which is termed mere right. And sometimes there is conjoined in one person the right of possession and the right of property, according to what is said, 'This person puts him-

[150] BRACTON, fol. 372b, 206b; CO. LIT. 266a.

[151] Blackstone resolves a complete title into three primary elements, — right of property, right of possession, and possession, — and identifies the first two with the *droit droit* of the older law (2 COM., c. 13, p. 199); but whatever basis there may be for this threefold division in the subsequent history of the law, it only tends to confuse to read it into the law of the time of Bracton. Coke is in accord with Bracton and his contemporaries. See CO. LIT. 266a.

[152] Bracton recognized that there might be rights of property relatively good or bad, according to the priority of the seisins whence they sprung (fol. 434b, quoted *infra*, p. 606), as that there might be various degrees of possession or right of possession (ff. 39, 159, 206).

[153] BRACTON, fol. 39b; *supra*, n. 150; 1 BRITTON (Nichols), 225, 260, 311; FLETA, lib. 3, c. 15, § 5.

[154] BRACTON, fol. 434b, quoted *infra*, p. 606; 1 BRITTON (Nichols), 310.

[155] BRACTON, fol. 164.

[156] BRACTON, ff. 11, 30b, 31, 31b.

[157] Maitland, 3 SELECT ESSAYS, 591, 594.

[158] CO. LIT. 345a.

self upon an assise of Right right': and to whomsoever appertains the right of property, possession ought to follow him, because possession always follows property, but not the converse. And sometimes the right of property is divided from possession, because the property forthwith after the death of an ancestor descends to the next heir. . . . But nevertheless possession is not forthwith acquired by such persons, because another person, before an entrance into the inheritance, a relative or a stranger, may in the meantime put himself into seysine."

And then he goes on to state the characteristically English doctrine of relative proprietary right:

"And from the seysine of such a person a right of possession may descend to the lower heirs of such persons through the negligence of the proprietor; as if when the right of property descends to an earlier-born next of kin, a younger-born brother puts himself into seysine; and if after a long interval, so that he could not be ejected without a writ, he dies seysed of it, he transmits to his heirs with the right of possession, which he himself had as it were in fee, a certain right of property with the right of that possession, which ought to follow the first property, and so from heir to heir to infinity; and so there will be two rights of property by a different descent and different persons and degrees. . . . So that there may be several rights of property, and several persons may have more right than others, according as they have been prior or posterior."[159]

Probably the most striking case in which an estate was turned to a right was that of the tortious feoffment. Such a transfer could not have failed to separate the possession from the right, but there must have been serious question at first[160] as to whether to treat it as a disseisin with an immediate entry in the one next entitled or as what was known in the later law as a discontinuance when the only resort would have been to an action. Immediate entry meant forfeiture of the feoffor's original interest, whereas if an action was brought the feoffee could avail himself of his feoffor's warranty and in Bracton's time at least hold the feoffor's original estate.[161] The fact that entry deprived the feoffee of his warranty was probably the reason that entry was extended so slowly against

[159] BRACTON, ff. 434b, 435 (trans. Twiss). See also 1 BRITTON (Nichols), 31a. The heir's seisin in law was yet for the future. See 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 60.

[160] See 2 POLLOCK AND MAITLAND, 54, and Maitland, 4 L. QUART. REV. 297.

[161] BRACTON, fol. 31; 1 BRITTON (Nichols), 226. See also Maitland, 4 L. QUART. REV. 286, 297.

the feoffee.[162] In Littleton's time entry and consequently forfeiture had become the general rule.[163] Finally in Archer's Case it was held that the tortious feoffment of the life tenant destroyed the life tenancy in fact and in law and extinguished any contingent remainders dependent upon it.[164] The same effect was given to a fine and recovery when they were used in place of a feoffment.[165]

On the other hand, if the conveyance did not operate by transmutation of possession but were of the right alone,[166] as in case of grants and releases, there was nothing about it to effect a severance of possession from right or, in other words, the notion of an estate turned to a right had no application.[167] In fact there could be no real possession of interests that lay in grant, such as rents and reversions and remainders, and therefore there was no real possession to be separated from the right. But as we have seen a certain kind of seisin was ascribed to them,[168] and this seisin could be devested or discontinued and the estate of the reversioner or remainderman turned to a right by any act that devested or discontinued the actual freehold,[169] for in many respects the life tenant and the remainderman were as one tenant in law.[170] Interests that lay in grant were incorporeal or future, and therefore unsusceptible of entry,[171] and no law of forfeiture developed because of attempts of grantors to transfer more right in them than they had.[172] As the bargain and sale and the covenant to stand seised also operated as conveyances of right and not by transmutation of possession,[173]

[162] See Maitland, 4 L. QUART. REV. 286, 288, citing BRO. ABR. *Entre Congeable*, 48.

[163] *Infra.*

[164] 1 Co. Rep. 66b. The same view had been taken by four of the judges in Chudleigh's Case, 1 Co. Rep. 120a, 135b.

[165] LEAKE, PROPERTY IN LAND, 41, 238. See also Butler's note (1) VII to Co. LIT. 330a.

[166] See Butler's note (1), I, 3, to Co. LIT. 272a.

[167] That a feoffment might have a tortious operation, while a grant could not, was noticed as early as 1310. See Maitland's note (1) to Sel. Soc. Y. B. 3 ED. II, 7. See also LIT., § 618, and Co. LIT. 332a.

[168] *Supra*, p. 593.

[169] See LIT., § 470, and Co. LIT. 275b.

[170] LIT., § 471.

[171] There is some evidence that livery of seisin, the tortious feoffment, entry and forfeiture were at one time applicable to incorporeal hereditaments (Pike, 5 L. QUART. REV. 29, 31), but this materialism was foreign to Bracton and disappeared.

[172] Co. LIT. 251b; Butler's note (1) to Co. LIT. 233b.

[173] See Butler's note (1) V, VI, 1, to Co. LIT. 272a and note (1) VII to Co. LIT. 330a.

they were likewise incapable of turning an estate into a right or causing a forfeiture.[174]

In the subsequent history of the law right of property in the broad sense in which Bracton had used it became split into the *right of property*, or 'mere right' of the writ of right, and the *right of possession*, which was the foundation of the writ of entry. At least such was Blackstone's classification,[175] and this was not without justification, for the writs of entry, which with Bracton were proprietary, had in time come to be deemed possessory instead.[176] The nomenclature is immaterial. Blackstone's right of possession, like his right of property, might exist apart from the actual seisin or be united with it,[177] and Blackstone himself recognized that when the older authorities spoke of the conjunction of right and seisin they were using 'right' to include both his right of property and right of possession.[178] And when they were speaking of the separation of right from seisin or that an estate was put or turned to a right they were likewise using right in this broad sense,[179] although here Blackstone slipped and identified it with the mere right of the writ of right.[180]

Using right in the broad sense of proprietary right, and not in the narrower sense of the 'mere right' of the writ of right, the history of the law from Bracton's time to the present has been the history of the gradual triumph of right over seisin until seisin gave way to possession, as we have seen, and the idea of an estate turned to a right became obsolete. Instead of an estate turned to a right we have land in the adverse possession of another.[181] The story of that triumph is the story of how the right of property, though not invested with but separated from the seisin, gradually gained

[174] Sugden's note to GILB. USES, 232.

[175] 2 COM., c. 13.

[176] See 2 POLLOCK AND MAITLAND, 72.

[177] 2 COM. 196.

[178] *Id.*, 199. See *supra*, n. 151.

[179] This is clear from the fact that disseisin was the most common occasion of an estate being turned to a right and that in such a case the one entitled was by no means put to his writ of right. See Butler's note (1) to Co. LIT. 332b.

[180] 2 COM. 197. Blackstone clearly misreads Coke (Co. LIT. 345a), who refers to an estate turned to a right by a disseisin and even by a descent. Butler, with Blackstone in mind, recognizes that 'right' in its strict technical sense had come to mean the right of the writ of right but interprets the expression 'an estate turned to a right' in the broad sense of Coke (note (1) to Co. LIT. 332b).

[181] *Infra.*

substance and life, of how it gradually drew to itself the right to enter until it was the exceptional case where the one who had the right of property had to resort to his action,[182] of how right of entry and right of action became the technical terms to describe the right of property when it was separated from the seisin except where both entry and action were gone and the naked right was all that remained,[183] of how right of entry finally displaced right of action [184] but was itself pushed aside first by tenancy at sufferance,[185] then by disseisin at election,[186] until finally it was displaced by adverse possession and right of property became a true ownership.[187]

As long, however, as right of entry remained a technical term of the land law, what gave it vitality was that it was something more than its name implied. Just as recovery in ejectment meant little unless the recoveror had some right or interest in the land which entitled him to hold the land after the recovery,[188] so the right of entry meant little in itself. What gave it vitality was the title or interest, the right of property, back of the right to enter and which would be realized in possession by the entry.[189] Right of entry was therefore not properly a mere right to recover the land. It was a right to enter and to enjoy such right of property as the holder had. It was right of entry plus right of property. Logically the order should have been reversed.

The gradual extension of the right of entry has been depicted by Maitland.[190] Bracton and the judges of his time had a comprehensive and rigorous system of possession.[191] In the ordinary case four or five days was all that was allowed the disseisee to re-enter.[192] Until then, according to Bracton, the disseisee was still seised in mind though not in body.[193] The disseisor had the natural possession but not the civil.[194] Acquiescence for that period gave the disseisor both kinds of possession. He was thenceforth entitled to an assize against the disseisee who attempted to enter and thus had

[182] *Infra.*
[183] *Infra.*
[184] *Infra.*
[185] *Infra.*
[186] *Infra.*
[187] *Infra.*
[188] Sedgwick and Wait, 3 SELECT ESSAYS, 611, 629.
[189] ADAMS, EJECTMENT, 4 Am. ed. by Waterman, 391; SEDGWICK AND WAIT, TRIAL OF TITLE TO LAND, § 510.
[190] The Beatitude of Seisin, 4 L. QUART. REV. 24, 286.
[191] Maitland, 4 L. QUART. REV. 26, 34.
[192] *Id.*, 29; 2 POLLOCK AND MAITLAND, 50.
[193] *Id.*; BRACTON, fol. 38.
[194] BRACTON, ff. 163b, 209b.

a certain right of possession or right of property which would descend to his heir.[195] Britton gave a new turn to this by requiring 'title' to the freehold of the plaintiff in the assize, although the sufferance and negligence of the true owner might suffice for this 'title.'[196] 'Titled' possession was now alone protected against the self-help of the disseisee and acquiescence soon lost its hold as a kind of 'title.' Entry on the disseisor became lawful no matter what the length of his holding.[197] It became a maxim of the law that to be free from entry the tenant must be 'in by title' and not 'in by tort,'[198] and a note to Britton supposed to be by John of Longueville, a justice of Edward the Second's time, tells us that there were but two kinds of title, inheritance and purchase.[199] For a hundred years or more the right of entry seems to have stopped at this point [200] but the test was a hard one to apply.[201] The feoffee in fee of a tenant for years was in by title but after the statute of Westminster II he was a party to the disseisin.[202] He was in by title but it could not be said that he was not in by tort. Even a feoffment subsequent to a disseisin might be in bad faith, but questions of good and bad faith were beyond the ken of the law courts and the feoffment proved a poor stopping point.[203] In the time of Henry IV the alienee still seems to be protected,[204] but in 32 Henry VI [1454] [205] we find Littleton stating the law much as it appears in his Tenures. Henceforth it was only a descent cast that would toll an entry.[206]

Even the cutting off of the entry by a descent cast might be avoided by a mere entry and claim within a year before the disseisor's death.[207] And if there was danger of personal violence from such entry it was sufficient to make the claim as near the land as possible.[208] To be sure that claim should be made within a year of the disseisor's death it was desirable that it should be made each

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[195] BRACTON, ff. 163b, 209b. See also fol. 434b, quoted *supra*, p. 606.

[196] 1 BRITTON (Nichols), 309–310; Maitland, 4 L. QUART. REV. 24, 39. Bracton, however, also referred to time as a kind of 'title.' See ff. 165b, 39.

[197] Maitland, 4 L. QUART. REV. 286, 296.

[198] *Id.*, 287, 296.

[199] 1 BRITTON (Nichols), 309.

[200] Maitland, 4 L. QUART. REV. 286, 296, 298.

[201] *Id.*, 296.

[202] STAT. WEST. II, c. 25.

[203] Maitland, 4 L. QUART. REV. 286, 298.

[204] Y. B. 7 HEN. IV, 17–10.

[205] Y. B. 32 HEN. VI, 27–16.

[206] Maitland, 4 L. QUART. REV. 298, 286.

[207] LIT., §§ 421, 422, 424.

[208] *Id.*, § 421.

year and so it came to be known as continual claim.[209] A statute of Henry VIII [210] provided that no claim need be made to prevent the tolling of an entry until the disseisor had been in possession for five years, and although this was confined by the courts to cases where the land descended from the disseisor himself and not from his feoffee or donee, or from an abator or intruder,[211] the statute cut down the tolling of entries to comparatively rare cases.[212]

The loss of the right of entry and the relegation of the one entitled to his right of action was sometimes termed a discontinuance, but more properly discontinuance applied to cases where there was no entry but merely a right of action from the first.[213] The three instances of discontinuance adduced by Littleton were feoffments in fee simple by a husband seised in right of his wife,[214] by a tenant in tail,[215] and by an abbot seised in right of his monastery.[216] The transferee had a lawful interest during the life of the husband, tenant in tail, or abbot, and no entry was given the wife, issue or successor, but on the death of the tortious transferor they were put immediately to their action.[217] These cases of discontinuance were also reduced to a minimum by legislation of Henry VIII.[218] The wife was given an entry after her husband's death [219] and the monasteries were dissolved. Already by means of a common recovery it had become possible to do much more than discontinue an estate tail, it had become possible to destroy it.[220] Discontinuance even in its broad sense had become an anomaly, even a rare anomaly.[221] It was not until almost three hundred years later, however, that the discontinuance was eliminated and the one entitled ensured in all cases of his right to enter. By the Real Property Limitation Act of 1833 it was enacted that no descent cast, discontinuance, or warranty should toll or defeat any right of entry or action for the recovery of land.[222]

The same year that the husband was prevented from discontinuing his wife's land was passed the so-called Pretended Title Act.[223] It was not couched in the technical language of seisin or

[209] LIT., § 423.
[210] 32 HEN. VIII, c. 33.
[211] See Co. LIT. 238a, 256a.
[212] Maitland, 4 L. QUART. REV. 299, 290.
[213] Butler's note (1) to Co. LIT. 325a.
[214] § 594.
[215] § 595.
[216] § 593.
[217] Butler's note (1) to Co. LIT. 325a.
[218] Maitland, 4 L. QUART. REV. 290.
[219] Stat. 32 HEN. VIII, c. 28, § 6.
[220] Maitland, 4 L. QUART. REV. 290.
[221] *Id.*, 299
[222] 3 & 4 WM. IV, c. 27, § 39.
[223] 32 HEN. VIII, c. 9, § 2.

entry but indirectly it did much to develop right of entry as a technical term of the law and to place the non-transferability of non-possessory rights on the plausible ground of the avoidance of maintenance.

The Statute of Uses [1536] had provided in the bargain and sale, and the like, a medium adapted for the transfer of mere rights.[224] It did not go further and make such rights transferable, for it was applicable only where the transferor was seised. On the other hand, it did not prohibit such transfers, and there were apparently those who when out of possession availed themselves of the new forms of conveyance.[225] At any rate, four years later we get the statute "against maintenance and embracery, byeing of titles &c," [226] one section of which was aimed directly at the new conveyances. These were not to be made use of unless the transferor or those under whom he claimed had been in possession of the land one year next preceding the transfer, on pain of forfeiture of the value of the land by the seller and, in case of guilty knowledge, by the buyer also.[227] There was to be an end to the trafficking in disputed titles.

The drastic requirement of a year's possession was too much for Montague, C. J., and in *Partridge* v. *Strange* [228] he expressed the opinion that the statute should be read in the light of reason. By repunctuation of the statute he took it to refer only to transfers by persons out of possession and arrived at the desired result that

"in this point the statute has not altered the law, for the common law before this statute, was, that he who was out of possession, might not bargain, grant, or let his right or title, and if he had done it, it should have been void. Then this statute was made in affirmance of the common law, and not in alteration of it, and all that the statute has done is, it has added a greater penalty to that which was contrary to the common law before."

Henceforth maintenance became the accepted ground for the non-transferability of non-possessory rights [229] and their attempted transfer was even sometimes referred to as a common-law crime.[230] There was little foundation for either of these views in Montague's

[224] See *supra*.
[225] See the preamble to 32 HENRY VIII, c. 9.
[226] 32 HEN. VIII, c. 9.
[227] *Id.*, § 2.
[228] 1 Plow. 77, 88.
[229] Co. LIT. 213b; Lampet's Case, 10 Co. Rep. 46b, 48a.
[230] HAWK. PL. CR., Bk. I, c. 86, § 1.

opinion or in the earlier authorities.[231] Almost certainly it was seisin and not maintenance that he had in mind.

Montague's offhand statement of the old law of seisin raises the question as to how far the right of entry was, prior to the Pretended Title Act, a non-transferable, non-transmissible right. The confiscatory legislation of Henry VIII raised many questions as to the transfer of non-possessory rights and the judges thought they saw a difference in the old books between the transferability of an action or of a condition on the one hand and of an entry for a disseisin or the like on the other.[232] These older authorities involved the right of the lord to escheat or wardship where the tenant had been disseised and there had been no feoffment or descent cast at the time of his death.[233] They were not therefore exceptional cases based on the sovereignty of the king, as were the cases involving forfeiture of chattels.[234] Both Maitland [235] and Ames [236] associate these instances of the transmissibility of rights of entry with Coke, but for once Maitland is misleading. The authorities he cites [237] show that the rule allowing escheat in these cases was well settled in the time of Richard II [238] and Henry IV,[239] although there was somewhat of a reaction later.[240] Brian, C. J., saw their inconsistency with his thesis that a trespass changed property in a chattel into a non-transmissible right and so denied them,[241] but in so doing contra-

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[231] See Winfield, 35 L. QUART. REV. 50, 72.

[232] Winchester's Case, 3 Co. Rep. 1a, 2 (1583).

[233] The main authorities as to escheat and forfeiture of rights of entry and action are given by Maitland, 3 SELECT ESSAYS, 591, 599, n. 2. As to wardship in like cases see the authorities cited in Butler and Baker's Case, 3 Co. Rep. 25a, 35a, and Co. LIT. 76b.

[234] See Ames, 3 SELECT ESSAYS, 541, 558.

[235] 3 SELECT ESSAYS, 591, 598.

[236] *Id.*, 541, 545, n. 2.

[237] *Id.*, 591, 599, n. 2.

[238] FITZ. ABR. *Entre Congeable*, pl. 38. (Hil. 3 RIC. II.)

[239] Y. B. 7 HEN. IV, 17–10. See also Y. B. 2 HEN. IV, 8–37.

[240] There was no denial of the right of the lord to enter in the later cases except by Brian, but whereas Hankford had held that the allegation that the tenant died seised was non-traversable (Y. B. 2 HEN. IV, 8–37), and Fortescue would have allowed the lord both the writ of escheat and the writ of right of escheat, though the tenant did not die seised (Y. B. 37 HEN. VI, 1–1), Pole *contra*, Littleton would have allowed the entry but not the writ (Y. B. 32 HEN. VI, 27–16), and Brian made the same distinction (Y. B. 15 ED. IV. 14–17). Fitzherbert would have allowed both the writ of escheat and the writ of right of ward in such a case (FITZ. NOV. BREV. 144), and his opinion probably settled the matter.

[241] Y. B. 6 HEN. VII, 9–4; Y. B. 10 HEN. VII, 27–13.

dicted his earlier statement that the lord had an entry in such a case.[242]

The transmissibility of the entry in these cases seems to have stopped where the entry itself stopped for so long: at the point where the adverse holder was in by title and not by tort.[243] This transmissibility was not necessarily inconsistent with the inability of the older law to conceive of the transfer of a right which could not be realized in a seisin, for the older law seems to have been deeply influenced by Bracton's view that the disseisee might retain civil possession after the loss of the natural possession.[244] Butler's statement, that when the right of entry was lost and the party could only recover by action there was a discontinuance of the *possession*,[245] is strictly in accord with Bracton's view.[246] And the well-settled rule of the common law that a right of entry would and a right of action would not support a contingent remainder was based on the idea that as long as the right to enter continued, the estate, and therefore the seisin, continued in contemplation of law.[247] Fearne's explanation was that "whilst a right of entry remains there can be no doubt but the same estate continues; since the right of entry can exist only in consequence of the subsistence of the estate." [248] The same idea was back of the familiar notion that a right of entry in contrast with a right of action was a right of possession.[249] It seems probable that the reaction against the escheat of entries which we find in Littleton's and Brian's time was a result of the great extension of the entry which had then taken place and the establishment of the general incompatibility of right of entry and seisin in law.[250]

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[242] See *supra*, n. 240. [243] See *supra*, p. 610.

[244] See *supra*, p. 609. [245] Note (1) to Co. Lit. 325a. [246] Fol. 164.

[247] Archer's Case, 1 Co. Rep. 63b, 66b; Leake, Property in Land, 42; Williams, Real Property, 22 ed., 375; Challis, Real Property, 121.

[248] Contingent Remainders, 6 ed., 285.

[249] See Challis, Real Property, 89; Lightwood, Possession, 77; Williams, Real Property, 22 ed., 375.

[250] Lightwood, Possession, p. 46, says: "The extension of the right of entry was not accompanied by any corresponding prolongation of the seisin in favour of the disseisee, and the disseisin might be complete, although the disseisor's right of entry still existed." This would seem to be true in general of the law of Littleton's time, but to be doubtful as to the time when the rule that entry depended on whether the tenant was in by title or in by tort was still in force. As to the incompatibility of right of entry and seisin in law in the classic land law see Challis, Real Property, 234, and Maitland, 3 Select Essays, 591, 597.

Until right of entry and seisin in law did become generally incompatible there would seem to have been nothing more difficult about the transfer, as well as transmission, of the right of entry than about the transfer of any other interest of which there was seisin in law.[251] Livery in deed would not have been available because it meant actual seisin, but there was livery in law, and in a case in the reign of Edward III it was stated that where one dared not approach certain lands for fear of death, a charter of feoffment of the same might yet be made effectual through parole claim and livery within the view.[252] The case in mind seems to have been a livery within the view by a disseisee, but it does not appear clearly whether the claim was to be by the feoffor prior to the livery [253] or by the feoffee afterwards so as to constitute an entry in law.[254] Any claim sufficient to prevent the tolling of an entry by a descent cast would seem to have been sufficient in cases of this kind also.[255]

Furthermore, that there was no well-settled rule in the Middle Ages that rights of entry because of a disseisin were not transferable [256] is evident from the failure of Brian, C. J., to refer to such a rule when he ransacked the law of real property to support his thesis that his 'right of property' in chattels was not transferable.[257] The nearest he could come to it was that when a man had been disseised of rent, he could not grant it over.[258] When the Statute of Uses, therefore, provided a medium adapted to the transfer of such rights, it may well have been that but for the Pretended Title Act their transfer would have become general. Certainly thereafter their non-transferability was placed not on any inherent defect in their transferability but on the ground of the avoidance of maintenance.

[251] The possibility of using livery in law in such a case was first brought out by Costigan, 19 HARV. L. REV. 267, 272.

[252] 38 Ass. pl. 23; 13 Vin. Abr. 184; COKE'S LAW TRACTS, 265, 266; Co. LIT. 48b; Costigan, 19 HARV. L. REV. 273, n. 3.

[253] See 13 Vin. Abr. 184 and COKE'S LAW TRACTS, 265, 266.

[254] See Co. LIT. 48b and BRO. ABR. *Assise*, pl. 349, *Feoffment*, pl. 32.

[255] Co. LIT. 48b.

[256] In § 347 of his TENURES, Littleton is referring to entries for condition broken and not to entries in general. Coke's commentary is much broader. See Co. LIT. 214a.

[257] Y. B. 6 HEN. VII, 9–4; Y. B. 10 HEN. VII, 27–13.

[258] Y. B. 10 HEN. VII, 27–13. In his statement that the grant of rent of which one had been disseised would be void, Brian is contradicting Littleton (§§ 589, 590, 591). Littleton's opinion was that such a disseisin was a disseisin at election.

The cases arising under the Pretended Title Act were never numerous in England.[259] They were mostly suits for penalties under the act. Not until 1845 does it seem to have been decided that a transfer in violation of the act was void.[260] No attempt seems to have been made on the part of a grantee to sue in the grantor's name, although this was allowed in the case of a chose in action as early as the time of Henry VII.[261] A considerable number of the early cases involved leases to try title [262] and the decision that their execution without entry came within the penalties of the act [263] had important consequences. In the early stages of ejectment to try title it made entry and right of entry a prerequisite for ejectment,[264] and while the necessity of an entry was afterwards avoided by fictions [265] the necessity of a right of entry remained.[266] This did much towards giving right of entry the prominence it had in the 1700's and 1800's and prevented ejectment from being the universal action for the recovery of land for two hundred years.[267]

That the general adoption of the terms 'right of entry' and 'right of action' to indicate the respective rights of the disseisee

[259] The cases in chronological order are: Partridge *v.* Strange, 1 Plow. 77, 1 Dyer, 74b; Waly *v.* Burnell, Dal. 56, pl. 1; Gerrarde *v.* Worseley (lease to try title), 3 Dyer, 374a, 1 Anderson, 75; Stamp's Case, 3 Leon. 78; Slywright *v.* Page (l. t. t. t.), Moore, 266, Gould. 101, 1 Leon. 166, 1 Anderson, 201; Finch *v.* Cokaine (l. t. t. t.), Sav. 95; Taylor *v.* Brounsal, 2 Leon. 48; Mowse *v.* Weaver, Moore, 655; Leigh *v.* Helyar (l. t. t. t.), Moore, 751; Robinson's Case (l. t. t. t.), 2 Brown. & G. 271; Flower's Case, Hobart, 115; King *v.* Hill, Cro. Car. 232, Godb. 450; Goodwin *v.* Butcher, 2 Mod. 67; Kennedy *v.* Lyell, 15 Q. B. D. 491 (1885).

[260] See Doe d. Williams *v.* Evans, 1 C. B. 717 (1845), and Jenkin *v.* Jones, 9 Q. B. D. 128 (1882).

[261] See Sweet, 10 L. QUART. REV. 303, 310.

[262] See *supra*, n. 259.

[263] It was argued by Anderson, J., Gould. 101, that even though the one who had title, entered and executed the lease while temporarily in possession, it was within the statute, but in Finch *v.* Cokaine, *supra*, and Robinson's Case, *supra*, it was held that this would not be so if the lease to try title were made to a son, servant, or other inferior. And in such a case Coke would have made the validity of the lease to try title the general rule. Co. LIT. 369a. But if the lease were made or sealed by one out of possession, there would seem to have been no question but that it was within the statute. See also RUNNINGTON, EJECTMENT, 1 Am. ed. 145, and 3 BL. COM. 201.

[264] 3 BL. COM. 201; ADAMS, EJECTMENT, 4 Am. ed. by Waterman, 12.

[265] 3 BL. COM. 202.

[266] 3 BL. COM. 206; ADAMS, EJECTMENT, 4 Am. ed. by Waterman, 12.

[267] 1 PRESTON, CONVEYANCING, 247, suggests that if the confession of lease entry and ouster had been carried to its utmost extent, it would in strictness have been an admission of the lessor's seisin. This would have enabled one to bring ejectment notwithstanding a discontinuance.

and discontinuee was contemporaneous with the use of ejectment to try title will be evident to any one who searches for those terms in the pages of Littleton and Coke. 'Entry,'[268] 'right and title to enter,'[269] 'cause to enter,'[270] 'title to enter,'[271] 'title of entry,'[272] appear frequently in Littleton, but 'right of entry' seems to be used only twice;[273] and while Coke in his Commentaries corrects Littleton for using 'title of entry' when 'right of entry' would be more accurate,[274] he seldom uses 'right of entry' himself.[275] The difference in this respect between Coke's Commentaries and Butler's Notes is very marked. And Blackstone in his famous chapter on titles does not mention right of entry, but has much to say of possession, right of possession, and right of property.[276] Is it not likely that the necessity for distinguishing between the entry which was confessed in the action of ejectment and the right to that entry which was not confessed and marked the limit between ejectment and the old real actions was the cause of the sudden ubiquity of 'right of entry' in the books. Even with Fearne 'right of entry' had no distinct personality but was merely incidental to the "subsistence of the estate"[277] of the disseisee, as with Bracton it was incidental to his civil possession.[278] In truth right of entry and right of action were helpful terms of art in the law of real property as long as the distinction between devestment and discontinuance prevailed and when that vanished their reason for existence ceased.

It has already been noticed that the most notable survivals of the old seisin in the modern system of land law were the fine and the recovery and the tortious feoffment.[279] In order that a recovery should bar an estate tail there had to be a good tenant to the *praecipe*[280] and strangers to a fine might avoid the barring of their right under the statutes 4 Henry VII, c. 24, and 32 Henry VIII, c. 36, notwithstanding a non-claim of five years, by a plea of *partes finis nihil habuerunt*.[281] In either case a freehold estate was necessary.

[268] Bk. III, c. 6.
[269] §§ 394, 403, 414.
[270] §§ 402, 405, 417.
[271] §§ 419, 421, 429.
[272] §§ 426, 427, 428.
[273] §§ 430, 633.
[274] Co. Lit. 252b.
[275] Instances of the use of 'right of entry' by Coke are Co. Lit. 245b, 252b, 258a, 266a.
[276] 2 Com., c. 13.
[277] *Supra*, p. 614.
[278] *Supra*.
[279] *Supra*, p. 602.
[280] Challis, Real Property, 310; Williams, Real Property, 98.
[281] Challis, Real Property, 393, 306.

In the case of the entail it was essential to the proper working of family settlements that the remainderman or reversioner in tail should not bar the estate without the concurrence of the life tenant,[282] and in the case of the fine with proclamations the rule that the fine might be avoided if the parties to the fine had nothing in the land was thought worthy of an express saving clause in the statute.[283] But if the bare possessor could by a tortious feoffment create a good tenant to the *praecipe* or confer a tortious freehold sufficient to support a fine, these rules meant little, for the feoffor to his own use would straightway be invested with the seisin by the statute of uses [284] and no apparent change of possession take place. Accordingly we find the judges in Coke's time looking with suspicion on feoffments entered into with such a purpose by those having particular interests and apparently inclined to regard them as fraudulent *per se*.[285] Later judges took much the same view,[286] and especially Lord Mansfield. In the much maligned case of *Taylor* d. *Atkyns* v. *Horde*,[287] he not only pronounced them fraudulent [288] but went much further. His reasoning would have deprived the feoffment of any tortious operation [289] and would have confined the old notion of an estate turned to a right or, as it had long become, the doctrine of the tortious freehold, to cases where one held under a valid fine with proclamations [290] or there had been a discontinuance.[291] For disseisin he would have substituted dis-

[282] Probably the greater part of the land of England was, and possibly still is, held in strict settlement, that is, under limitation to the settlor for life with successive remainders in tail to the sons. When the settlor's eldest son becomes of age, a resettlement is made. The successful working of the scheme depends on the concurrence of the life tenant and the tenant in tail in remainder in the resettlement. See Underhill, 3 SELECT ESSAYS, 673, 674. See also 1 Burr. 116.

[283] 4 HEN. VII, c. 24, § 10.

[284] This is noticed by Butler at the end of his note (1) to Co. LIT. 330b.

[285] See Fermor's Case, 3 Co. Rep. 77a, 79a. Coke lays stress on the fact that the feoffor remained in possession and continued to pay rent and in such a case it became established law that the fine based on the feoffment was a nullity (see Thomas' note (R) to 3 Co. Rep. 79a and 2 SANDERS, USES, 16), but the disfavor of the judges was not confined to cases of this kind and apparently extended to all cases where there was an attempt to circumvent the Statute of Fines by means of a tortious feoffment.

[286] See particularly the opinion of Hale, C. J., in Whaley *v.* Tankard, 2 Lev. 52. In Parkhurst *v.* Smith, Willes, 327 (1741), Willes, C. J., assumed that a feoffment would be effective in such a case, but held that a fine by a tenant for years was not equivalent to a feoffment for this purpose.

[287] 1 Burr. 60 (1757).

[288] *Id.*, 114–119.

[289] *Id.*, 114.

[290] *Id.*, 111–112.

[291] *Id.*, 107.

seisin at election.[292] This necessitates our retracing our steps for a minute.

If right of entry had its advantages over right of action, it was much better still for the owner if his estate were not turned into a right at all. We see this at work very early in the law. Thus, as we have seen, Bracton denied the loss of seisin till entry was gone.[293] And whereas with Bracton the heir before entry had merely a right,[294] by the time of Littleton he had seisin in law.[295] So in Littleton [296] we find that where the younger son anticipated the heir it was presumed that he entered claiming as heir, and his death did not cut off the entry of his elder brother.[297] Again, no estate was devested where a man of his own head occupied lands and claimed nothing but at will.[298]

For a time it looked as if the bare possessor who was neither a lawful tenant nor a tortious freeholder would receive the general appellation of 'tenant at sufferance.' Prior to the Statute of Uses this term had been commonly applied to the *cestui que use* in possession.[299] Such possession as he had was clearly compatible with the seisin of another. In like case was the tenant at will who held over after the death of the lessor and therefore after the determination of the will,[300] or more broadly any one who occupied land of his own head without claiming anything but at the will of an-

[292] 1 Burr. 111–112.

[293] *Supra*, p. 609.

[294] *Supra*, p. 606.

[295] § 448.

[296] § 396. See also LIGHTWOOD, POSSESSION, 161.

[297] Coke, however, thought that the younger son had the fee and inferred that this was Littleton's view from the fact that Littleton called the entry of the younger son an abatement. Co. LIT. 242a.

[298] § 461. Coke would have it that Littleton was referring only to the hold-over tenant and that the one who *entered* of his own head and occupied at will was a disseissor on the ground that a wrongdoer could not qualify his wrong (Co. LIT. 271a); but while Littleton probably had in mind the hold-over tenant, the case first suggested by his language is that of the squatter. See *infra*, n. 301. That Coke's commentary states the law as changed in the time of Henry VIII, see *infra*, n. 306.

[299] 1 SANDERS, USES AND TRUSTS, 65; Y. B. 4 ED. IV, 8–9; Y. B. 15 HEN. VII, 2–4; Basset *v.* Manxel, 2 Plow. (App.) 3; KEILW. 41b, pl. 2; *Id.*, 42b, pl. 7; *Id.*, 46b, pl. 2. But even according to Littleton a *cestui que use* in possession was like a tenant at will in that a release might be made to him (§ 464), and accordingly in later years both *cestuis que trust* and mortgagors in possession were treated as tenants at will (2 LEWIN, TRUSTS, 677, LIGHTWOOD, POSSESSION, 165), although the mortgagor was such only *quodam modo* (Moss *v.* Gallimore, 1 Doug. 279), and it was urged that he was more properly a tenant at sufferance. (Note to Keech *v.* Hall, 1 Smith L. C. 5 Am. ed., 659.)

[300] BRO. ABR. *Tenant per copie*, pl. 4, citing 21 HEN. VI, 37; Y. B. 21 HEN. VII, 38–47, *per* Brooke, of counsel.

other.[301] The term 'tenant at sufferance' was applied to these also, but more especially to the hold-over tenant.[302] In order further to avoid the consequences of disseisin it was also applied to the tenant who held over after a term for years [303] or after an estate for the life of another,[304] although in both these cases the hold-over tenant had been considered to have the fee in the time of Edward IV.[305] But with this extension of tenancies at sufferance in the time of Henry VIII came also a limitation of their scope. According to Brooke [306] it became law that one who entered without authority, even though he claimed nothing but at the will of the owner, was not a tenant at sufferance but a disseisor. Only one who had entered by title could be a tenant at sufferance, and in Coke [307] this came to be still further restricted to the hold-over tenant who had come in by lease and not by an estate created by act in law, as guardian in chivalry or tenant in dower or by curtesy. Coke's definition of tenant at sufferance stereotyped it and its broader career was cut short.

The tendency to limit the devesting of the freehold, however, would not down and it took the form of an extension of the doctrine of disseisin at election. Disseisin at election appears in very modest form in Littleton,[308] where the example given of it is that of a rent service in gross collected by force by one having no right

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[301] See *supra*, n. 298. That Littleton's language in § 461 was intended to include one who entered wrongfully as well as one who held over is borne out by 31 Lib. Ass. pl. 6, Y. B. 11 & 12 Ed. III, 46, Bro. Abr. *Tenant per copie*, pl. 7, 1 Rolle Abr. 659.

[302] See Bro. Abr. *Tenant per copie de court rol, tenant a volunte & tenant per suffrance*, pl. 4, 7, 8, 20, but see pl. 15. See also the opinion of Bridgman, C. J., in Geary *v.* Bearcroft, O. Bridgman, 484, 488 (1666).

[303] Owen, 35; Sir Moil Finch's Case, 2 Leon. 134, 143; Bro. Abr. *Tenant per copie*, pl. 15.

[304] Lord Zouche's Case, 1 Dyer, 57b; Rouse's Case, Owen, 27, 2 Leon. 45, Tudor, Leading Cases Real Property, 1; Allen *v.* Hill, Cro. Eliz. 238, 3 Leon. 152.

[305] Y. B. 18 Ed. IV, 25–16; Y. B. 22 Ed. IV, 38–23. 1 Tiffany, Landlord and Tenant, 149, attributes to 2 Smith L. C. 533, note to Nepean *v.* Doe, Tudor, Leading Cases Real Property, 2 ed., 9, and Lightwood, Possession of Land, 161, the suggestion that these tenancies were created to avoid the running of the statute of limitations and then proceeds to show that this was a chronological impossibility, but Smith's statement is that "it was for the very purpose of preventing the true owner's entry from being taken away, that the law originally raised such tenancies," and it is submitted that such was the case. It was to avoid the effects of the old disseisin, not to avoid the running of the statute.

[306] *Tenant per copie*, pl. 15.

[307] Co. Lit. 57b.

[308] §§ 588, 589. See also Pollock and Wright, Possession, 88.

to it. This could be treated as a disseisin of the rent and an assize brought against the pernor, or treated as no disseisin and the rent distrained for or granted over. Rents lay in grant, and of them there could be no discontinuance or devestment.[309] Coke barely touches on disseisin at election,[310] but in the time of Charles I [311] three judges in the King's Bench to one declared that a lease for years by a tenant at will was no disseisin but a disseisin at election, "and so much the rather for the great mischief which would ensue, if one who hath a tenant at will, who makes a lease for a small time, and the first lessor, not knowing thereof, levies a fine for a jointure for his wife, or to perform his will, or to other uses, etc., if he should be adjudged disseised, . . . many should lose their inheritances." This was directly contrary to the decision in *Rouse's Case* [312] in the time of Elizabeth and was contrary to Coke.[313]

But Coke had stood between the old system of land law and the new,[314] while Lord Mansfield was the embodiment of the new. The latter seized on disseisin at election as laid down in *Blunden* v. *Baugh*, and would have given it an extension that would have left little of the tortious feoffment or of disseisin in general.[315] He said that the changes in the land law had left "little but the names of *feoffment, seisin, tenture and freehold;* without any precise knowledge of the *thing originally signified*, by these sounds." [316] He saw that ejectment had made the necessity of entry an anomaly,[317] that the theory of ejectment differed *in toto* from that of disseisin, in that the latter involved the devesting of the freehold, while the former was based on the dispossession of one who was not a freeholder.[318] He held, therefore, that the right to bring ejectment without a previous entry was a right to treat any wrongful holding as a dispossession instead of as a disseisin, and that accordingly every such holding was a disseisin merely at the election of the one entitled.[319] This was of course revolutionary. It profoundly dissatisfied the

[309] Co. Lit. 306b, 323b.

[310] The principal passages in the commentaries are those cited in the preceding note.

[311] Blunden *v.* Baugh, Cro. Car. 302, 305 (1632).

[312] Owen, 27, 2 Leon. 45, Tudor, Leading Cases Real Property, 1.

[313] See Hargrave's note (3) to Co. Lit. 57a.

[314] Butler's Preface to Co. Lit. xxiii.

[315] Taylor d. Atkyns *v.* Horde, 1 Burr. 60, 107 (1757).

[316] *Id.*, 108.

[317] *Id.*, 111–112.

[318] *Id.*, 111, 113.

[319] *Id.*, 112.

conveyancers,[320] but it seemed 'good sense' to Lord Mansfield's successors [321] and it dealt a blow to the old disseisin from which it never recovered.[322] The elimination of disseisin, however, was left for the reform legislation of the next century.[323]

It is from Lord Mansfield's time that the notion of an estate turned to a right or the doctrine of the 'tortious freehold' has been generally termed disseisin. Already disseisin had been used to indicate *the acquisition of a tortious freehold* whether by a disseisin properly so-called or by an abatement or intrusion,[324] and it was natural that this should have been extended to indicate *any* acquisition of a tortious freehold even by a deforcement or discontinuance in contrast with the bare possession of the now prominent disseisor at election. Preston used disseisin in this broad sense [325] and it is in this sense that it is used by Ames.

Disseisin at election, however, was at best but a negation of disseisin. It meant that the old estate was not devested, that it was not changed to a right, but it preserved the ancient terminology and was not a positive expression of the new order. Dispossession

[320] See Butler's note (1) to Co. Lit. 330b; 2 Preston, Abstracts of Title, 280; Challis, Real Property, 3 ed., 405, and Maitland, 3 Select Essays, 600, n. 3.

[321] Abbott, C. J., in Doe *v.* Lynes, 3 B. & C. 388, 402 (1824); Graham, B., in Jerritt *v.* Weare, 3 Price, 575, 598 (1817). The same controversy involved in Taylor *v.* Horde again came before the King's Bench twenty years later (Doe *v.* Horde, 2 Cowp. 689 (1777)) and Lord Mansfield refrained from sitting on it, but the judges placed themselves on record as approving his views.

[322] In Goodright *v.* Forester, 1 Taunt. 578 (1809), Jerritt *v.* Weare, *supra*, and in Doe *v.* Lynes, *supra*, Preston made determined effort to get the courts to disavow the doctrine laid down by Lord Mansfield in Taylor *v.* Horde, but with what success may be judged from the following comment of Chancellor Kent on Jerritt *v.* Weare. "In that case, Baron Graham, in delivering the opinion of the court, observed, that the principle of the decision in Taylor *v.* Horde rested on a foundation not to be shaken; and he spoke with even reprehensible harshness of the effort to revive the old doctrine of disseisin in its unmitigated force. Mr. Preston was not dismayed nor diverted from his opinions by that decision; and he says, in the preface to his third volume on Abstracts of Title, that he has stated his propositions on disseisin, though that decision was before him, with the fullest conviction of their accuracy. It is presumed, further, that Mr. Preston is the same person, who, as counsel, once more brought up and enforced his tenacious opinions on the efficacy of feoffment working a disseisin and creating a wrongful fee; and the K. B., in Doe *v.* Lynes (3 B. & C. 388), very peremptorily rejected them. His views on this subject, as laid down in his treatises on property, may therefore be considered as essentially expelled from Westminster Hall." 4 Com. 488, n. (b).

[323] *Supra*, p. 602.

[324] See note to Taylor d. Atkyns *v.* Horde, 2 Smith's Leading Cases, 495, 519.

[325] 2 Abstracts of Title, 285.

was the alternative to disseisin and so might have been expected to take its place had not something better presented itself. This was 'adverse possession.' It seems to have been first used by Lord Mansfield in the very case of *Taylor* d. *Atkyns* v. *Horde*.[326] It immediately found favor. It was used to indicate the kind of possession that would set the statute of limitations running. Eighty years later it was said to have been engrafted by the courts upon the statute.[327] It was therefore associated with a definite period of limitation from the first and this supplied the positive element that made it not a mere negation of disseisin but a substitution of something better. As long as there was no operative statute of limitations some doctrine of a defeasible title which it would gradually become more and more difficult to defeat but which would never become perfectly good, would seem to have been almost inevitable. As soon as there was an operative statute of limitations, however, the essentially provisional nature of the possessory right until the running of the statute must have been manifest and any doctrine of defeasible title an anomaly. The significance of the blow which Lord Mansfield struck disseisin with his disseisin at election was that it left free play for the statute of limitations. There were those who would have fitted the statute of limitations into the old system and merely added it to the other casualties, such as descent cast, which the right of entry had to meet,[328] but their view was not accepted.[329] This failure to distinguish the new adverse possession from the old disseisin is a story in itself and will be taken up in another place.

That the doctrine of the tortious freehold should have fallen into such odium was largely due to the changed meaning which seisin had come to have. Blackstone and Butler stated the old doctrine that if A was disseised by B, while the possession continued in B, B had a *mere naked possession*.[330] Here there was no identification of seisin with ownership or any modification of ownership,[331] and if the tortious feoffment had been thought of in these terms it would

[326] 1 Burr. 60, 119.

[327] Nepean *v.* Doe, 2 M. & W. 894, 900 (1837), per Sir W. W. Follett, of counsel.

[328] Smith's note to Nepean *v.* Doe — Taylor *v.* Horde, 2 Smith's, L. C., 495, 530.

[329] Doe d. Parker *v.* Gregory, 2 A. & E. 14 (1834), 3 GRAY, CASES ON PROPERTY, 2 ed., 39. See also LIGHTWOOD, POSSESSION OF LAND, 162–164.

[330] 2 BL. COM. 198; Butler's note (1) to CO. LIT. 239a.

[331] See Maitland, 3 SELECT ESSAYS, 591, 600.

have met with more favor; but such was not the meaning of seisin that had generally come to prevail,[332] nor was it the meaning of seisin advanced by the most conspicuous advocate of the tortious feoffment and the old disseisin in general, namely, Preston. In the case of *Goodright* v. *Forester* [333] before the Exchequer Chamber Preston stated that "while the estate is vested, the owner retains the seisin of the estate: when the estate is devested, he no longer retains any ownership or seisin; for seisin and ownership are convertible terms." [334] Again, "the ownership is in the person who has the seisin, though the right of defeating that ownership is in the person who has the right or title of entry." [335] This was not common law but Preston,[336] and there is little wonder that the courts treated him with scant ceremony and that the Reform Parliaments were ready to wipe out disseisin root and branch. Ames took Preston's doctrine and elevated it into a "working principle for the determination of controversies for all time." [337] If this be historical jurisprudence there is little to wonder at the disrepute into which it has fallen.

(To be Concluded.)

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[332] See *supra*.

[333] 1 Taunt. 578 (1809).

[334] *Id.*, 588. See also 2 PRESTON, ABSTRACTS OF TITLE, 285, where it is said that "as soon as a disseisin is committed, the title consists of two divisions; first, the title under the estate or seisin; and secondly, the title under the former ownership."

[335] 1 Taunt. 578, 602 (1809). See also 2 ABSTRACTS OF TITLE, 396, where it is said: "A disseisor is in all other respects to be considered in the same situation as a rightful owner; with the difference, that his title is defeasible by the entry, or, according to circumstances, by the action of the rightful proprietor."

[336] Preston's treatment of disseisin calls to mind the following reference to Preston by Gray in his debate with Challis on determinable fees: "On the other hand in reading Mr. Preston, to whom Mr. Challis pays as much deference as so independent a writer can, I feel in fairyland, a very tedious fairyland." RULE AGAINST PERPETUITIES, 3 ed., § 778.

[337] 3 SELECT ESSAYS, 541, 590.